Supreme Court, U.S.
FILED
962044 JUN 26 1997
No OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

GEORGE KOST,

Petitioner,

vs.

J.T. HOLLAND,

Respondent.

PETITION FOR EXTRAORDINARY WRIT OF HABEAS CORPUS TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF HABEAS CORPUS

Filed By:

George Kost pro se
Reg. No. 08339-016
USP Allenwood
P.O. Box 3000
White Deer, Pa. 17887

RECEIVED
JUN 26 1997
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Questions Presented

I Whether The Accused Double Jeopardy Rights Were Violated When The Jury First Finds Him Guilty Of An § 846 Conspiracy In Indictment "1" And Moments Later Guilty Of An § 848 Charge In Indictment "2"?

II Absent An On The Record Consent By The Accused May Counsel Admit His Client's Guilty To Lesser Included Charges During Summation In Multi-Count Indictments?

III Was Counsel Ineffective Because The Cummulative Effect Of The Guilt Admissions Implicitly Conceded Kost's Guilt To Every Element Of The § 848 Charges?

Table Of Contents

	Page
Questions presented For Review:	i
Table Of Authorities:	iii
Opinions Below:	1
Jurisdiction:	2
Statement Of The Case:	3
Reasons For Granting The Writ:	4
Arguments;	
I Whether The Accused Double Jeopardy Rights Were Violated When The Jury First Found Him Guilty Of An 846 Conspiracy in Indictment "1" and Moments Later Guilty Of An 848 Charge In Indictment "2"?	4
II Absent An On The Record Consent By The Accused May Counsel Admit His Client's Guilt To Lesser Included Charges During Summation In A Multi-Count Indictments?	6
III Was Counsel Ineffective Because The Cummulative Effect Of The Guilt Admissions Implicitly Conceded Kost's Guilt To Every Element Of The § 848 Charges?	11
Conclusion	14
Opinion Of The Appellate Court, Appendix:	A 1
First Opinion Of The District Court, Appendix:	B 1
Second Opinion of The D.C.; Appendix:	C 1

Table Of Authorities

		Page
Achtien v. Dowd, (9th Cir. 1941)	117 F. 2d 989	10
Arizona v. California, (1983)	75 L. Ed 2d 318	13
Boykin v. Alabama, (1969)	23 L. Ed 2d 274	9
Brookhart v. Janis, (1969)	16 L. Ed 2d 314	10
Clozza v. Murray, (4th Cir. 1990)	913 F. 2d 1092	10
Cox v. Hutto, (8th Cir. 1979)	589 F. 2d 394	9
Francis v. Spragins, (11th Cir. 1983)	720 F. 2d 1190	10
Ingram v. United States, (1959)	3 L. Ed 2d 1503	13
Jeffers v. United States, (1977)	53 L. Ed 2d 168	4,5
Jones v. Butler, (5th Cir. 1988)	864 F. 2d 348	10
Messer v. Kemp, (11th Cir. 1985)	760 F. 2d 1080	10
Osborn v Shillinger, (10th Cir. 1988)	720 F. 2d 612	10
Ruckle v Warden Md. Penitentiary, (4th Cir. 1965)	335 F. 2d 336	10

Strickland v Washington, 84 L. Ed 2d 674 (1984) Passim

United States v. Beadon, 49 F. 2d 164 (2nd Cir. 1931) 11

United States v. Brown, 428 F. 2d 1100 (D.C. Cir. 1970) 9

United States v. Cronic, 80 L. Ed 2d 657 (1984) 6,15

United States v. Liefried, 732 F. 2d 388 (4th Cir. 1984) 10,14

United States v. Sanchez, 984 F. 2d 769 (7th Cir. 1993) 10

United States v. Sandini, 888 F. 2d 300 (3rd Cir. 1989) Passim

United States v. Swanson, 943 F. 2d 1070 (9th Cir. 1991) 10

Wiley v. Sowders, 647 F. 2d 642 (6th Cir. 1981) 9

Woods v. United States, 128 F. 2d 265 (D.C. Cir. 1942) 10

Young v. Zant, 677 F. 2d 792 10

Constitutional Provisions

Sixth Amendment Passim

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

1977

GEORGE KOST,

Petitioner,

vs.

J.T. HOLLAND,

Respondant.

PETITION FOR EXTRAORDINARY WRIT OF HABEAS CORPUS TO THE THIRD CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF HABEAS CORPUS

Petitioner George Kost respectfully prays that an extraordinary writ of habeas corpus issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, due to the remiss of the lower courts to address the cummulative effect of counsel's unauthorized admissions of his guilt to lesser included charges during summation, which implicitly conceded his client's guilt to the more serious charges in multi-count indictments, and a double jeopardy issue.

Opinion Below

The opinion of the Court of Appeals is unreported at United States v. Sandini-Kost, No: 93-3114 (3rd Cir. 1993), and appears as Appendix A in this petition. The unpublished opinion of

the District Court for the W.D. of Pennsylvania appears as Appendix B in this petition. The Second unpublished opinion of the District Court for the W.D. of Pennsylvania appears as Appendix C in this petition.

Jurisdiction

The Court of Appeals' Opinion in this cause affirming the denial of Kost's Title 28, U.S.C., § 2255 petition was filed on September 21, 1993. Rehearing was denied on October 14, 1993. A petition for writ of certiorari was untimely filed by counsel and not entertained.

A petition for writ of habeas corpus under Title 28, U.S.C., § 2241, filed in the district where Kost was confined (Middle District of Pa.) was transferred to the trial court (W.D. of Pa.) and denied on March 25, 1996, on the successive writ bar. No appeal was taken as the identical issues were denied by the appellate court in 1993.

The jurisdiction of this Honorable Court is is invoked pursuant to Title 28, U.S.C., § 1651(a) and Rule 26 of the Supreme Court Rules.

In good faith, petitioner believes that exceptional circumstances exist that warrant the exercise of this Court's discretionary powers due to the remiss of the lower courts to address his pleas for relief.

With the passage of the ANTI-TERRORISM ACT on April 24, 1996, he is precluded from seeking relief in a court below, because, as noted above, they refuse to address his pleas for relief from counsel's concessions of his guilt during summation. He now faces a life sentence without recourse, save for this writ, simply because his criminal trial attorney conceeded his guilt during summation.

STATEMENT OF THE CASE

The United States District Court, Western District of Pennsylvania, had jurisdiction pursuant to Indictment "1" charging Petitioner ("Kost") with violating Title 21 U.S.C.§§ 841 and 846, and Indictment "2", charging Kost with violating § 848.

In July of 1988, after a two week jury trial on both indictments, Kost was convicted of violating §§ 841, 846, and 848, and sentenced to life imprisonment. At sentencing, Kost objected to counsel's admission of his guilt during summation. Nevertheless, trial counsel was appointed as appellate counsel. Only sentencing issues were raised on direct appeal, which affirmed the conviction, United States v. Kost, 888 F. 2d 1380 (3rd Cir. 1989)(Unpublished). Co-defendant David Thompson's direct appeal complained that the spillover effect of Kost's guilt admissions implicitly conceded his guilt to the § 846 charges. See United States v. Sandini-Thompson, 888 F. 2d 300 (3rd Cir. 1989).

In November of 1992, Kost filed an unsuccessful Title 28, U.S.C. § 2255 motion, contending that counsel was ineffective in that (1) Plain error had occurred because the decision to plead guilty is reserved solely for the accused (ii) the cumulative effect if the admissions of Kost's guilt to the 846 conspiracy, four 841 distribution acts, managing three people, other admissions, implicitly conceded his guilt to the 848 charges; (iii) it was double jeopardy to convict him of the 846 conspiracy in Indictment "1", and the 848 charges in Indictment"2".

The trial court denied relief, holding that Kost "failed to satisfy either prong of the Strickland test" because counsel's guilt admissions were a "strategic decision...to focus an attack on the CCE charge" since there was "overwhelming evidence of the conspiracy." No double jeopardy occurred because "Conspiracy is a lesser included ooffense of" the CCE statute. (App. B, page 3, and 5)

In a one paragraph order the appellate court affirmed (App. A). The petition for certiorari was untimely filed by counsel and not entertained.

Kost then filed a Title 28, U.S.C., 2241 action in the Middle District of Pennsylvania where

he was confined raising the identical issues, but arguing jurisdiction was proper because he could not obtain meaningful review in the trial court on the cumulative effect of counsel concession. The action was transferred to the trial court who, on March 25, 1996, denied the writ under the successive writ bar. (App. C).

REASONS FOR GRANTING THE WRIT

Kost believes the writ of habeas corpus should issue do to remiss of the lower court to address the fact that the cumulative effect of counsel's unauthorized admissions of his guilt during summation to the 841 and 846 charges, among other admissions, explicitly conceded his guilt to the 848 charges in violation of his rights to the effective assistance of counsel under United States v. Cronic, 80 L. Ed 2d 657 (1982), and Strickland v. Washington, 80 L. Ed. 2d 674 (1984). That his double jeopardy rights were violated when he was first convicted of the 846 conspiracy, and later the 848 charges, Jeffers v. United States, 53 L. Ed. 2d 168 (1977).

I Is The Accused Double Jeopardy Rights Violated When The Jury First Finds Him Guilty Of An 846 Conspiracy In Indictment "1" And Moments Later Guilty Of An 848 Charge Indictment "2"?

1) On June 28, 1985, the grand jury returned a 23 count indictment charging 19 individuals with violating the federal narcotics laws. Count 1 charges Kost and 14 others with an 846 conspiracy to possess with intent to distribute cocaine from August of 1981, through May of 1984. The 846 conspiracy included all the charges in the 23 substantive counts. Kost was charged with 841 distribution acts in Counts 6,8,9,10&11. (Indictment "1").

On July 29, 1985, the grand jury returned a one Count Indictment charging Elmer Sandine, Ernest Rockwell, Ronald Urbab, and Kost with operating a Continuing Criminal Enterprise (CCE) from the summer of 1981, through May of 1985, by trafficking in cocaine in violation of § 848. This was not a

superceding indictment (Indictment "2")

Without an objection by counsel, both Indictments were tried together. After the jury advised the court it had reached a verdict on both Indictments, in open court the jury announced its verdict on Indictment One and found Kost guilty of the 846 charge.

The court then inquired about the Second Indictment, whereby the jury announced that it found Kost guilty of the 848 charges.

2) Kost's 2255 motion contended that under the **Jeffers**, rationale, convicting him of the 848 charges in Indictment "2" after convicting him of the 846 charges in Indictment "1" violated his double jeopardy rights because both charges were based on the same criminal agreement. The district court held that a "Conspiracy is a lesser included offense" of the CCE and denied relief. The appellate court affirmed.

3) Kost argues the district and appellate courts took an erroneous view of the law because, unlike most 846 and 848 dual prosecutions charged in one indictment, here they were charged in seperate indictments, and the rule of law announced in **Jeffers** controls:

> "Because two offenses are 'the same' for double jeopardy purposes unless each requires proof of an additional fact the other does not, post, at 168, it follows that the sequence of the two trials for greater and lesser offense is immaterial, and trial on a greater offense after conviction on a lesser ordinary is just as objectionable under the Double Jeopardy Clause as the reverse order of proceeding." (53 L. Ed 2d 180)

Kost argues that since he was first convicted of the 846 offense in Indictment "1" and then convicted of the 848 charge in Indictment "2" and both the 846 and 848 were based on the same criminal agreement, the 848 conviction violated his double jeopardy rights.

Therefore, in Kost's belief, exceptional cir-

cumstances exist warranting the exercise of this Honorable Court's jurisdiction.

II **Absent And On The Record Consent By The Accused May Counsel Concede His Client's Guilt To Lesser Included Offenses In A Multi-Count Indictment?**

4) In chambers on the eve of trial counsel advised the Court that "I have not done anything," on this case because "I can get him to plead [guilty] probably."

At the close of the Government's case, counsel obtained a over the weekend recess to introduce "charts" that an "artist" had prepared in support of his defense. However, on the following Monday morning counsel rested without presenting a defense.

Counsel then proceeded to admit Kost's guilt to the 846 conspiracy, four 841 distribution acts, and to managing three people during summation.

> "Let me say this from the start. Mr. Kost is not going to contest the conspiracy. Beyond any reasonable doubt, Mr. Kost sold narcotics in the [W.D. of Pa.], he purchased some in Florida and sold them in [W.D. of Pa.], from about 1981 through whenever it was in 1984. No question. (888 F. 2d at 308)
>
> "So you have your conspiracy. Don't even think twice about it."
>
> "I would suggest to you that of all the substantive offenses, that's the only one that the government has evidence on which you can base a finding of guilty. That's the April the 19th, and for your reference that's Count 10 of the indictment."
>
> "I think there is some evidence on the 19th that you could find that Mr. Kost had cocaine in his possession... On the 19th there's evidence to find

him guilty, and I'm not going to stand in front of you and say there isn't."

"Now certainly there may have been more cocaine later in the week. Clearly, there was a lot more cocaine in 1984, as explained to you by Nora Julaino, and none of that is being disputed here."

At the trial Nora Julaino testified to three seperate $250,000 cocaine transactions between her and Mr. Kost. Counsel then went on to concede Mr. Kost's guilt to managing three people.

"Let me give you an example of where perhaps Mr.Kost did organize or control or manage another individual. You have heard testimony about Mr. Thompson being employed as a body guard. That's the type of relationship that you're talking about in terms of organizing, managing or controlling another individual. I don't think there is any doubt that based on what you have been told here today, that you could clearly find that Mr. Thompson was organized or managed by Mr. Kost. I don't see any problem with doing that." (888 F. 2d at 308)

"I don't see any problem in a couple of others. I don't see any problem in you finding that Mr. Kotulo, who was a relative of Mr. Kost, was organized or managed by Mr. Kost. I don't think you'd have too much problem finding Jim McAuiffe to have worked for Mr. Kost, but I think that's where it stops."(888 F. 2d at 308-09)

"Now, I would like to ask you to keep

> that in mind. Again, we're not asking for any kind of total victory. What we're asking for is that you consider these matters seriously, consider the dates on which they were charged, and consider the continuing criminal enterprise charge, and I hope that in light of that you'll be able to find him not guilty of those charges, which I would suggest he is not guilty of.
>
> And those which he has admitted to you through me, that there's no problem with guilt there. I think if you do that, you will have performed your function and will satisfy both the government and Mr. Kost in a just manner, which is all that you can be required to do.
>
> Thank you very much for your time."

The latter statement, "and those which he admitted to you through me," was untrue and unauthorized.

5) The jury acquitted Kost for two 841 distribution counts, but found him guilty of the 846 Conspiracy, Four 841 distribution counts (The Conceded Charges), and to Managing a Continuing Criminal Enterprise, (CCE) under § 848.

At sentencing, Mr. Kost, informed the Court that:

> "I asked Mr. Janavitz (counsel) not to plead me guilty in summation to any counts, and he went and did it... and I don't know, Mr. Janavitz can comment on those items if he'd like to."

Rather than inquire if counsel's concessions were in fact authorized by Mr. Kost and settle the matter then and there, the Court responded that:

> "Well, he'll get an opportunity in a subsequent proceeding. Federal law provides that after sentence is imposed today... an appeal will be taken [by]

Mr. Janavitz. I intent to appoint him appellate counsel... he can advance whatever arguments may exist on the merits."

6) Only sentencing issues were advanced on direct appeal. The 2255 motion contended a new trial was warranted due to counsel's ineffectiveness in that: (a) the guilt admissions were not authorized and failed to subject the prosecution's case to a meaningful adversarial testing, United States v. Chronic, 80 L. Ed 2d 657, 688 (1984); and (b) the cumulative effect of the admissions on the lesser included offenses implicitly conceded his guilt on the CCE charges under the two prong test in Strickland v. Washington, 80 L. Ed 2d 674 (1984).

Without holding an evidentiary hearing, or a word from counsel, the Court denied the writ holding that Kost "failed to satisfy either prong of the Strickland test". Because there was "overwhelming evidence of the conspiracy" counsel's concessions were a "strategic decision to focus an attack on the CCE charge." (App. B). In a one paragraph order the appellate court affirmed. (App. C).

7) Mr. Kost contends that the decision to plead "guilty" or "not guilty" is a decision reserved solely for the accused based on his intelligent and voluntary choice, Boykin v. Alabama, 23 L. Ed 2d 274 (1969). Similarly, an attorney may not admit his client's guilt, which is contrary to an earlier not guilty plea, absent an on the record inquiry that the plea is the result of a voluntary and intelligent decision. Brookhart v. Janis, 16 L. Ed 2d 314 (1966).

The appellate courts (Not Particularly By Circuit) are divided into two camps on this issue. One group stands for the proposition that absent an on record consent by the accused, counsel may not admit his client's guilt during summation, nor stipulate to facts which amount to the "functional equivalent" of a guilty plea, Wiley v. Sowers, 647 F.2d. 642, 649 (6th Cir. 1981), United States v. Brown, 428 F.2d. 1100, 1103 (D.C. Cir. 1970), Cox v. Hutto, 589 F. 2d

394, 395-96 (8th Cir. 1979), Achtien v. Dowd, 117 F. 2d 989 (7th Cir. 1941), Francis v. Spraggins, 720 F. 2d 1190, 1194 (11th Cir. 1983), Osborn v. Shillinger, 720 F. 2d 612, 627 (10th Cir. 1988), Young v. Zant, 677 F. 2d 792 (11th Cir. 1982), United States v. Swanson, 943 F. 2d 1070, 1073, (9th Cir. 1991), United States v. Simone, 931 F. 2d 1186, 1196 (7th Cir. 1991).

Other Court's have held counsel's "tactical retreats" on some charges, but not others is reasonable and not ineffectiveness, United States v. Sanchez, 984 F. 2d 769, 772 (7th Cir. 1993), Clozza v. Murray, 913 F. 2d 1092, 1100 (4th Cir. 1990), United States v. Leifried, 732 F. 2d 388, 390 (4th Cir. 1984), Jones v. Butler, 864 F. 2d 348, 366 (5th Cir. 1988), Messer v. Camp, 760 F. 2d 1080, 1090 (11th Cir. 1985).

8) Mr. Kost argues, that rule of law expressed by this Court in Boykin, and Brookhart, and the appellate courts following their rationale is the correct approach to resolve this issue. For example, at arraignment, neither the court or counsel may enter a guilty plea, when the accused stands mute despite overwhelming evidence. Ruckle v. Warden, MD Penitentiary, 335 F. 2d 336 (4th Cir. 1965), Wood v. United States, 128 F. 2d 265 (D.C. Cir. 1942), United States v. Beadon, 49 F. 2d 164 (2nd Cir. 1931). He sees no reason why, absent his consent, the right should evaporate during counsel's closing argument. That is :

> "A lawyer may properly make the tactical determination of how to run a trial even in the face of his client's incomprehension or even explicit approval." Brookhart v. Janis, at 16 L. Ed 2d 314 (1966).

However, notwithstanding the strong policy favoring an attorney's control over a criminal case:

> "the expression by a lawyer of his personal opinion as to the justness of a cause, as to the credibility of a civil litigant or as to the guilt

or innocence of an accused is not the proper subject for argument to the trier of fact."
(Canon 7 (EC 7-24) A.B.A. Code of Professional Responsibility, 647 F. 2d at 648.

Mr. Kost urges this Court to accept review of this writ, and order that the rule of law established in Boykin and Brookhart continues to this day. Absent an on record consent, counsel may not concede his client's guilt during closing arguments, save for entrapment and insanity defenses.

III WHETHER COUNSEL WAS INEFFECTIVE BECAUSE THE CUMULATIVE EFFECT OF THE GUILT ADMISSIONS CONCEDED KOST'S GUILT TO EVERY ELEMENT OF THE 848 CHARGES

9) To sustain a 848 conviction it was encumbant upon the prosecution to prove narcotic "enterprise" existed, the accused joined the enterprise, knowingly and intentionally violated § 848, and committed the following acts:

1) Three felony violations of the federal narcotic law;
2) As part of a continuing series of violations;
3) In concert with five or more persons;
4) For whom the accused was an organizer, manager, or supervisor; and
5) From which the accused derived substantial income or resources.

United States v. Boldin, 818 F. 2d 771, 774, (11th Cir. 1987).

10) Counsel's concessions of guilt to Count 1, (Conspiracy); Count 10 (an 841 distribution act), and to three $250,000 cocaine purchases later in the

week from Nora Julaino, satisfied the First, Second, and Fifth requisites.

Counsel's concessions that Kost "organized or managed" Thompson, Katula, McAuiffe, plus the conspiracy involving 14 other co-conspirators distributing cocaine over a three year period, some at Kost's bequest, satisfied the Third and Fourth requisites, established the narcotic "enterprise" and conceded his means to knowingly and intentionally violate § 848.

With respect to a verdict, there was nothing left for the jury to decide on the 848 charge but to return a guilty verdict.

11) Kost's argument below that the cumulative effect of counsel's concession's, as outlined above, implicitly conceded his guilt to the CCE charges by failing to subject the prosecution's case to a meaningful adversarial testing under the Cronic, rationale, hence, "presumed" ineffectiveness, 80 L. Ed 2d at 668-669, has never been addressed.

The trial Court's promise "we'll [] get an opportunity in a subsequent proceeding" to resolve this issue fell on deaf ears.

12) When co-defendant Thompson complained that Kost's concessions on the 848 conspiracy and to managing him under the 848 enterprise factor, implicitly conceded his guilt to the 846 charges the Appellate Court held:

> "We recognize that it might have been prudent for the district court on its own initiative to have interrupted Kost's attorney's summation to emphasize that the attorney's argument was not evidence. But we certainly cannot find plain error, if there was error at all, in the failure to do so, 888 F. 2d at 311.

However, the court's charge to the jury was to the contrary:

"The statements and arguments of the lawyers are not evidence unless as an admission of stipulation of the facts. They should be of considerable help to you, however in understanding the position of the parties."

[The court then instructed on the elements of an 848 offense, which parroted in part counsel's admissions of Kost's guilt]

When Kost appealed his 2255 denial contending that the law of the case was not being applied to his action, Arizona v. California, 75 L. Ed 2d 318, 333, (1983), the appellate court cast a blind eye to his plea, despite its earlier notation that "in view of Kost's conviction for conducting a continuing criminal enterprise, it is evident that the argument was not effective at all." 888 F. 2d 311, fn. 6.

Thus, counsel's admission of Kost's guilt coupled with the court's instructions amounted to an improper directed verdict of guilt on the 848 charges, sanctioned by the appellate court.

13) Next, under the Strickland rationale, if counsel's retreat was a "strategic decision to focus an attack on the CCE charges" as the lower courts held, then Kost was entitled to a review of the cumulative effect of that strategic decision "because reasonable effective assistance must be based on professional decisions and informed legal choices," 80 L. Ed 2d at 688. Obviously, counsel's pretrial admissions that, "I have not done anything on this case" continued through closing arguments because his "informed legal choices" conceded Kost's guilt to the 848 charge.

Thus, the cause factor is that counsel's wholesale concessions were not the product of "informed legal choices." The prejudice factor is that counsel retreated too far by conceding guilt to the conspiracy and by proxy Kost's mens rea violate § 848. That is, the essence of a conspiracy is the criminal agreement, Ingram v. United States, 3 L. Ed 2d 1503 (1959). Since the same criminal agreement that formed the

basis for the 846 conspiracy, also formed the basis for the in concert element of § 848, Rutledge v. United States, 134 L. Ed 2d 419 (1996), means that it was impossible to admit guilt to one and not the other. This is absolutely true if the jury followed it's instructions.

Additional prejudice may be noted that, with respect to two unconceded 841 distribution counts, the jury acquitted Kost. Thus, there is a reasonable probability that save for counsel unprofessional errors, the jury would have acquitted him of the 848 charges.

14) With respect to tactical retreats in 848 prosecutions, the lower courts have sanctioned concessions of guilt to 841 distribution counts, United States v. Simone, 931 F. 2d 1186, 1194-95-96, (7th Cir. 1991), United States v. Leifried, 732 F. 2d 388, 390 (4th Cir. 1984), but never to the 846 conspiracy.

The bar to this in 846 and 848 prosecutions is evident. Counsel's admission of guilt to the conspiracy with it's overlap of dates, places, participants, and events with the 848 charges foredoomed any possibility of an acquittal on the 848 charge.

Counsel was so unprepared that he failed to realize the consequences of admitting Kost's guilt to the 846 agreement to distribute cocaine, was also an admission to Kost's agreement to violate the 848 charges and it's distribution acts.

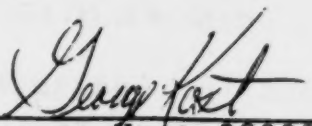
15) Because the lower courts have refused to address the cumulative effect of counsel's admissions of Kost's guilt as not "sound trial strategy" 80 L. Ed 2d at 695, Kost seeks the sanctuary of this Court to relieve him of a term of life imprisonment in violation of his Sixth Amendment right to the effec- assistance of counsel.

CONCLUSION

Wherefore, George Kost respectfully prays that this Honorable Court accept review of this action, set aside the 848 conviction on double jeopardy

grounds, and/or order a new trial on all the charges due to counsel's ineffectiveness.

Respectfully submitted,



George Kost 08339-016
USP Allenwood
P.O. Box 3000
White Deer, Pa. 17887

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

NO. 93-3114

UNITED STATES OF AMERICA

v.

Hilmer Burdette Sandini,
a/k/a H.B. Sandini, Sandy, The Old Man;
GEORGE WHITE KOST,
a/k/a George Kostishach, Maitre D', Richard Reed,
RICHARD PAUL URBAN

George Kost,

Appellant

On Appeal from the United States District Court
for the Westren District of Pennsylvania
(D.C. Civ. No. 92-1485)
(Related to D.C. Crim. No. 85-175)
District Judge: Honorable Donald E. Ziegler

Submitted under Third Circuit LAR 34.1 (a)
September 14, 1993

BEFORE: MANSMANN, GREENBERG, and WEIS,
Circuit Judges

(Filed: Sept. 21, 1993)

JUDGMENT ORDER

After considering the contentions raised by the

appellant, to-wit, that (1) the appellant was denied his constitutional right to the effective assistance of counsel where his attorney's closing argument constituted a guilty plea to the charge of conducting a continuing criminal enterprise' (2) the appellant's attorney's unauthorized admissions of appellant's guilt during his closing argument violated appellant's rights to due process and the effective assistance of counsel; (3) the appellant's conviction for conducting a continuing criminal enterprise must be reversed where the court failed to instruct the jury as to which persons could not be counted in determining whether appellant was organizer, supervisor or manager of five or more persons, it is

ADJUDGED and ORDERED that the judgement of the district court be and is hereby affirmed.

Costs shall not be taxed on this appeal.

BY THE COURT:

_____

Circuit Judge

ATTEST:

_____

Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

GEORGE KOST, Petitioner,	)	
v.	)	C.A. No. 92-1485
	)	Criminal No. 85-175
UNITED STATES OF AMERICA, Respondent.	)	

OPINION

ZEIGLER, J.

Pending before the court is the motion of petitioner, George Kost, to vacate his conviction and judgement of sentence, pursuant to 28 U.S.C. § 2255. In two separate indictments returned by the grand jury in 1985, Kost and others were charged with various narcotics offenses. In Criminal No. 85-150, Kost was charged with one count of conspiracy to possess with intent to distribute cocaine in violation of 21 U.S.C. § 846, and five counts of possession with intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1). In Criminal No. 85-175, Kost was charged with conducting a continuing criminal enterprise (CCE) in violation of 21 U.S.C. § 848.

While the other defendants in Criminal No. 85-150 were tried and convicted or pleaded guilty in 1985, Kost and david Thompson were jointly tried on the charges stemming from both indictments in 1988. Kost was convicted by a jury of conspiracy and three counts of possession with intent to

distribute cocaine (No. 85-150) and convicted of conducting a criminal enterprise (No. 85-175). Kost was sentenced to life imprisonment without parole on the CCE conviction. The judgement of t sentence was affirmed by the Court of Appeals for the Third Circuit. See United States v. Kost, No. 88-3586 (3rd Cir. Oct. 13, 1989).

In this collateral attack, Kost raises a myriad of issues which he contends warrant that his conviction s be vacate. Among the errors alleged, Kost contends that his Sixth Amendment right to effective assistance of counsel was violated, that his conviction on the CCE count violated the Double Jeopardy Clause of the Fifth Amendment, and that there was insufficient evidence to sustain the government's burden on one element of the CCE charge. After reviewing the submissions of the parties, we hold that these contentions as well as the other arguments raised in by Kost are without merit. The petition will be denied.

Kost contends that he was denied the right to effective assistance of counsel because, among other errors, his trial attorney conceded during his closing argument that Kost was guilty of the cnspiracy charge. In order to sustain a claim under the Sixth Amendment, a petitioner must show that counsel's conduct was deficient by identifying "acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgement." Strickland v. Washington, 466 U.S. 688, 690 (1984). Petitioner must also show that counsel's

conduct prejudiced his defense by demonstrating a "reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." Id. at 694. Furthermore, petitioner must overcome the strong presumption that counsel rendered adequate assistance and acted in accord with sound trial strategy. Id. at 690. We hold that George Kost has failed to satisfy either prong on the Strickland test with regard to his claim that trial counsel's concessions during closing argument violated his right to effective assistance of counsel.

As the Court of Appeals recognized in the appeal of Kost's co-defendant, David Thompson, there was overwhelming evidence of the conspiracy. United States v. Sandini (Appeal of David Thompson), 888 F.2d 300, 303 & 307-08 (3rd Cir. 1989), cert. denied, 494 U.S. 1089 (1990). Under these circumstances, we conclude that petitioner has failed to establish that the concession of guilt to some charges falls below an objective standard of reasonableness that satisfies Strickland's first prong. Rather, it more properly is characterized as a strategic decision by counsel to focus an attack on the CCE charge.

Kost also argues that because he did not authorize counsel to concede probable guilt to the conspiracy and other charges in his closing argument petitioner's right of due process and effective assistance of counsel were violated. The United States Supreme Court noted in Strickland that "an

inquiry into counsel's conversations with the defendant might be critical." 466 U.S. at 691. Several factors lead us to conclude that this is not such a case. First, in his reply brief, petitioner correctly notes that he informed the court of this alleged lack of authorization. Reply at 7. Our review of the record, however, indicates that this contention was brought to the attention of the court only at sentencing. In considering a similar argument, the Court of Appeals for the Seven Circuit noted:

> We do not approve of a defense counsel's deliberate, explicit admission that a jury should find his client guilty of a charge in the absence of any suggestion that the defendant concurred in the decision to proceed in such a manner. However, in the case before us, [the defendant's] attorney intentionally stipulated facts and conceded charges for which there was unrefutable evidence and no mandatory sentences, but forcefully argued [his] innocence on the charges with heavier penalties, as part of a trial strategy. It was a reasonable plan that was evident from the beginning of the trial. At no time did the defendant object to it; in fact, we believe he chose or atleast condoned the tactics.

United States v. Simone, 931 F. 2d 1186, 1196, (7th Cir. 1991), cert. denied, ___U.S.___, 112 S.Ct. 584 (1991).

The defendant in Simone argued lack of authorization for the first time on direct appeal. After review of the record we conclude that, under the

circumstances, petitioner's post-trial assertion of lack of authorization fails to establish a violation of the performance prong of Strickland. Moreover, even assuming that an objection was raised with counsel during trial, petitioner has failed to establish, or even argue, that the prejudice prong of Strickland has been met. Petitioner's contention must be rejected. We also find no merit to other errors alleged by Kost with respect to the alleged ineffective assistance of counsel as a basis for vacation of conviction.

Kost next contends that his conviction on the CCE charge in Criminal No. 85-175 violated the Due Process and Double Jeopardy clauses of the Fifth Amendment. Petitioner, in effect, argues that a criminal defendant may not be charged and tried in one proceeding with both a conspiracy and conducting a continuing criminal enterprise. Kost also argues that the government must prove two conspiracies for a jury to convict on both conspiracy and CCE charges. These contentions are without merit because, as Kost recognizes, Petitioner's Brief at 82, conspiracy is a lesser included of-

fense of conducting a continuing criminal enterprise, and the argument has been rejected by the Court of Appeals. See United States v. Fernandez, 916 F. 2d 125 (3rd Cir. 1990), cert. denied, ____ U.S.____, 111 S.Ct. 2249 (1991); United States v. Aguilar, (Appeal of Ramon Sosa), 843 F. 2d 155 (3rd Cir. 1988), cert. denied, 488 U.S. 924 (1988). Thus, neither a violation of double jeopardy nor unconstitutional prejudice from "spillover" of evidence resulted from the trial of the conspiracy and CCE charges in one proceeding.

Kost further contends that the evidence at trial was insufficient to prove that he managed, supervised or organized five or more persons in conducting the enterprise, which is an element of the CCE charge, and the trial court's erroneous charge to the jury with respect to this element requires that the conviction be vacated. In addition, Kost contends that the trial court's failure to give unanimity instruction with respect to the identity of the five or more persons that he was alleged to have organized, supervised or managed was plain error.

"The verdict of the jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." Glasser v. United States, 315 U.S. 60, 80 (1942); See also Aguilar, 843 F. 2d at 157-58. After reviewing the record, we agree with the position of the government in its response and conclude that there was clearly sufficient evidence for the jury to find that Kost supervised, managed or organized the conduct of five or more individuals.

Kost argues that the jury instructions with respect to the numerosity element was improper. As we understand this contention, Kost argues that the trial court's instruction created a conclusive presumption which invaded the province of the jury. See Sandstrom v. Montana, 442 U.S. 510 (1979). Petitioner contends that (1) the court instructed the jury that he was an organizer and manager of five persons and (2) this instruction permitted the jury to assume that any person to whom he sold cocaine could be used to reach the numerosity requirement.

The specific portion of the instruction to

which petitioner directs our attention is as follows:

> It is not required that George Kost acted in concert with five or more persons in the commission of any single offense, or that he had personal contact or actual control over the persons that he organized or managed. (emphasis added)

Supplemental Appendix at 317 (transcript at 93). With respect to the first contention, we note that this instruction was immediately followed by this statement:

> For purposes of this offense, it is sufficient if the government proves beyond a reasonable doubt that George Kost was in concert with five or more people and as to them occupied a position or organizer, supervisor or manager. (emphasis added)

Id Moreover, the court had previously instructed the jury that "it's for you to decide whether the United States has established the elements of the offense beyond a reasonable doubt," see Supplemental Appendix at 327 (transcript at 73), and, "Now, George Kost is charged with conducting a continuing criminal enterprise. The Government must therefore -- must prove beyond a reasonable

doubt that... that Mr. Kost occupied a position of organizer or supervisor or manager with respect to the five persons charged in the indictment." Supplemental Appendix at 328 (transcript at 92). Thus, when viewed as a whole and not in isolation as petitioner would have us do, we hold that the trial court's charge to the jury neither established a conclusive presumption plain error requiring vacation of the CCE conviction.

We also find no merit with respect to petitioner's contention that the charge permitted the jury to assume that anyone to whom he sold the cocaine was chargeable to him. Petitioner's conclusion simply does not follow from the instruction given. Furthermore, we find no merit to Kost's contention that the trial court erred in failing to instruct the jury that it must unanimously agree to the identity of the five or more persons that he allegedly organized, supervised or managed. Kost relies on United States v. Jerome, 942 F. 2d 1328 (9th Cir. 1991). We note, however, that the Court of Appeals for the Third Circuit has rejected this approach. See United States v. Jackson, 879 F. 2d

85, 90 (3rd Cir. 1989) ("[T]here is no general requirement that the jury need be unanimous as to the identities of the underlings.").

We find that the remaining contentions are similarly without merit. George Kost's motion to vacate his conviction and judgement of sentence will be denied.

A written order will follow.

DATED: March 5, 1993

Donald E. Ziegler
United States District Judge

cc: Counsel of record

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	)	
	)	
vs.	)	Civil Action 95-2071
	)	Criminal No. 85-175
GEORGE KOST	)	

ORDER OF COURT

AND NOW, this _____ day of March 1996, the court finds as follows:

1. The opinion and order of this court dated March 5, 1993, addresses and rejects the contentions which are raised in the instant and second motion for post-judgement relief of George Kost based on 28 U.S.C. §2255;

2. The Court of Appeals affirmed the judgement of this court on September 21, 1993;

3. The instant and second motion of George Kost raises the same issues which were rejected by this court on March 5, 1993;

4. The prior determination of this court was on the merits;

5. The additional contention that venue does not lie in Western District of Pennsylvania is devoid of merit and was rejected by the Court of Appeals in the appeal of co-defendant David Thompson. See United States v. Sandini, 881 F. 2d 300, 311 (3rd Cir. 1989);

6. A challenge to the sufficiency of the evidence at Count X following a direct appeal and

the first post-conviction petition based on 28 U.S.C. §2255 is an abuse of the writ;

7. The challenge to the sufficiency of the evidence at Count X is without merit;

8. The instant motion is a successive motion under the teachings of Sanders v. United States, 373 U.S. 1 (1963) and United States v. Biberfeld, 957 F. 2d 98, 104 (3rd Cir. 1992); and

9. As we previously held, trial counsel for George Kost was neither deficient nor ineffective in any respects, and petitioner has failed to satisfy the two prong test of Strickland v. Washington, 466 U.S. 668, 687 (1984).

IT IS THEREFORE ORDERED that the second petition of George Kost for relief of the judgement of sentence, based on 28 U.S.C. 2255, and for writ of habeas corpus, be and hereby is denied as repetative, successive and without merit.

Donald E. Ziegler
Chief Judge

cc: Counsel of record